

1975

## The Second Circuit and Attorney Disqualification--Silver Chrysler Steers in a New Direction

Laura D. Millman

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Laura D. Millman, *The Second Circuit and Attorney Disqualification--Silver Chrysler Steers in a New Direction*, 44 Fordham L. Rev. 130 (1975).

Available at: <https://ir.lawnet.fordham.edu/flr/vol44/iss1/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## THE SECOND CIRCUIT AND ATTORNEY DISQUALIFICATION—*SILVER CHRYSLER* STEERS IN A NEW DIRECTION

### I. INTRODUCTION

An attorney who represents a client against a former client is subject to a motion for disqualification<sup>1</sup> under Canon 4<sup>2</sup> of the Code of Professional

1. The courts' power to disqualify is noted in, e.g., *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975); *Handelman v. Weiss*, 368 F. Supp. 258, 261 n.4, 263 (S.D.N.Y. 1973); *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 93, 95 n.1 (S.D.N.Y. 1972); *Laskey Bros., Inc. v. Warner Bros. Pictures, Inc.*, 130 F. Supp. 514, 519 (S.D.N.Y.), *aff'd*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 271 n.15 (S.D.N.Y. 1953). The court may disqualify an attorney on its own motion. *Empire Linotype School, Inc. v. United States*, 143 F. Supp. 627, 631 (S.D.N.Y. 1956).

2. Canon 4 (adopted by the American Bar Association on Aug. 12, 1969 to become effective on Jan. 1, 1970, as amended on Feb. 24, 1970) states: "A lawyer should preserve the confidences and secrets of a client." ABA Code of Professional Responsibility, Canon 4 (1969). Among the pertinent Ethical Considerations are EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. . . ."), EC 4-4 ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. . . .") and EC 4-6 ("The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.") (footnotes omitted).

Since the Code of Professional Responsibility was adopted so recently, most cases cited in this article will be referring to the former Canons 6 and 37 of the Canons of Professional Ethics (adopted by the ABA in 1908). Canon 6 stated, in pertinent part: "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." ABA Canons of Professional Ethics No. 6 (1908).

Canon 37, as amended Sept. 30, 1937, stated in pertinent part: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client." *Id.*, Canon 37 (1937).

That Canon 4 of the Code of Professional Responsibility replaces 6 and 37 of the Canons of Professional Ethics is evident. See *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 570 n.6 (2d Cir. 1973); R. Wise, *Legal Ethics* 65 (2d ed. 1970); and *Parallel Tables-between the ABA Canons of Professional Ethics and the ABA Code of Professional Responsibility*, Final Draft, July 1, 1969 11-12 (O. Maru comp. 1970) [hereinafter cited as *Parallel Tables*]. On the conceptual differences between the former Canons and the present Code, see Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. Ill. L.F. 193, 197-98. For a broad discussion of conflicts of interest and a proposed Disciplinary Rule, see Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client*, 55 B.U.L. Rev. 61, 84-85 (1975).

Responsibility. There have been many cases in this area dealing either with partners, associates or sole practitioners who controlled litigation for a client whom they later opposed or with attorneys who did not deal directly with the former client (the present opponent), but whose partner had represented that client in a substantially-related matter. Motions to disqualify former junior associates are relatively recent.<sup>3</sup>

Such motions bring into sharp focus the problem of which standard for disqualification is to apply under Canon 4. The standards used by the courts in the past have varied from determinations of whether the attorney's two representations were "substantially related" to whether they merely created an "appearance of impropriety."

Recently, in a series of cases,<sup>4</sup> the Second Circuit examined the parameters for such decisions, and seemed to relegate the appearance of impropriety standard to a narrower range of situations than previously had been the case. Such an approach actually is more in line with the "appearance of evil" standard applied to Canon 9<sup>5</sup> cases, which have their primary application in

---

3. A trilogy of recent cases concerned the Shell Oil Company's attempts to disqualify the same young attorney: *Gas-A-Tron v. Union Oil Co.*, 1974-2 Trade Cas. ¶ 75,225, at 97,519 (D. Ariz.) (attorney and his firm disqualified to avoid appearance of impropriety); *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392, at 98,278-79 (D. Utah) (motion to disqualify denied; Canon 9 inapplicable) *rev'd* and remanded, 518 F.2d 311 (10th Cir. 1975); *Bonus Oil Co. v. American Petrofina Co.*, 5 Trade Reg. Rep. ¶ 60,315, at 66,263 (D. Neb. 1975) (motion to disqualify denied). Cf. *American Roller Co. v. Budinger*, 513 F.2d 982 (3d Cir. 1975) which applied Canon 4 to an attorney though his prior "representation" occurred before he received his law degree, since he had appeared before the U.S. Patent Office twenty-four times and was subject to the Canons through the Office's Rules of Practice. *Id.* at 984 n.1..

See generally ABA, Comm. on Professional Ethics, Opinions, No. 1092 (1968) (former law clerk cannot represent an intervenor in an action with which he was involved while clerking; the former clerk's firm is also prohibited from this representation); H. Drinker, *Legal Ethics* 107 (1953) ("A lawyer who was a student in a lawyer's office may not accept a retainer against his former employer involving matters of which he might have obtained knowledge while in such employment, and by reason thereof. . . ." [footnote omitted]). *Contra*, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), discussed in text accompanying note 91 *infra*.

4. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974).

5. Canon 9 states: "A lawyer should avoid even the appearance of professional impropriety." ABA Code of Professional Responsibility, Canon 9 (1969). Among the pertinent Ethical Considerations are EC 9-1 ("Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession."), EC 9-2 ("Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not

situations involving former government attorneys and other attorneys whose actions were *malum in se*.<sup>6</sup>

This Note will attempt to place the recent developments in this area of the law in their proper context, and will analyze the strengths and weaknesses of the different standards used by the courts. In particular, the impropriety of applying Canon 9's standard of appearance of impropriety in Canon 4 situations will be discussed, and reasonable guidelines for future standards will be proposed.

---

exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."), EC 9-3 ("After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.") and EC 9-6 ("Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety." (footnotes omitted)).

Canon 9 replaces, *inter alia*, former Canon 36 which stated: "A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

"A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ." ABA Canons of Professional Ethics No. 36 (1908).

Wherever feasible, the term "Canon 9" will be substituted for Canon 36 in cases before the Code was adopted. See Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541 (1974) for supplemental ethical canons applicable to federal government attorneys, and 174 N.Y.L.J., July 14, 1975, at 1, col. 3 for a six-canon Code of Professional Responsibility for Matrimonial Lawyers.

6. Compare the Disciplinary Rules of Canon 9 which considerably restrict the Ethical Considerations' usage of "Avoiding Even the Appearance of Impropriety:"

- "(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
- "(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
- "(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." ABA Code of Professional Ethics DR 9-101 (1969) (footnotes omitted).

As the Preamble and Preliminary Statement of the Code define them, "[t]he Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." In comparison, "[t]he Ethical Considerations are aspirational in character. . . ." ABA Code of Professional Responsibility 2 (1969). The idealism of the Ethical Considerations may explain their broader usage of "avoiding even the appearance of impropriety" than is reflected in the narrower, mandatory Disciplinary Rules. For further discussion of the ABA's intent in utilizing the phrase "appearance of impropriety" and whether courts have expanded the concept beyond the ABA's scope in Canon 4 cases dealing with opposing a former client, see notes 79-90 *infra* and accompanying text.

## II. BACKGROUND OF DISQUALIFICATION CRITERIA

The first major case within the Second Circuit dealing with disqualification was *T. C. Theatre Corp. v. Warner Bros. Pictures*,<sup>7</sup> in which the substantive legal issue concerned antitrust violations.<sup>8</sup>

Plaintiff's attorney had previously represented the defendant in a similar action.<sup>9</sup> His activities for defendant had been "preparation, drafting, presentation and argument in support of the findings of fact, conclusions of law and decree proposed. . . ."<sup>10</sup>

Before deciding that the two representations were substantially related, Judge Weinfeld observed that the attorney's previous involvement had been "no mere mechanical job of paste pot and shears. It involved the acquisition of a thorough knowledge of [defendant's] entire business."<sup>11</sup> Moreover, the attorney at issue was not a mere junior associate, but had been "in full command of [defendant's] legal forces. . . ."<sup>12</sup> Thus, the attorney's former activities constituted representation of the client, though Judge Weinfeld did not actually define "representation."

The quantum of proof and the relationship of attorney to client were crucial in understanding the justification of a disqualification order. According to Judge Weinfeld:

A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Related to this principle is the rule that where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.<sup>13</sup>

The confidences in the former relationship do not have to be revealed in court in order to prove the fact of violation.<sup>14</sup> To force disclosure of the prior confidences would violate the attorney-client relationship which, in turn, would inhibit clients from speaking freely to their attorneys.<sup>15</sup> To determine whether there is a sufficient attorney-client relationship for pertinent confidences to have been disclosed, "the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation."<sup>16</sup> Thus, the quantum of proof is not satisfied until the moving party establishes a substantial relationship between the prior and the subsequent matters.

---

7. 113 F. Supp. 265 (S.D.N.Y. 1953).

8. *Id.* at 267.

9. *Id.* at 268.

10. *Id.* at 270-71.

11. *Id.* at 271.

12. *Id.*

13. *Id.* at 268 (footnote omitted).

14. *Id.* at 268-69.

15. *Id.* at 269.

16. *Id.*

*T. C. Theatre* laid down a mixed standard of fact and assumption. If the fact of a former attorney-client relationship concerning substantially-related matters is proven, the disclosure of confidences is assumed. The attorney-client relationship is what is important, not the contents of the disclosure.<sup>17</sup> That some matters might even be on public record so that disclosure could not possibly reveal them is unimportant.<sup>18</sup> Interestingly, although the attorney was disqualified in *T. C. Theatre*, his associates were not.<sup>19</sup> Nowhere in the decision is the concept that the attorney or his firm had to be disqualified to avoid the appearance of impropriety, which concept was extant at the time in different wording.<sup>20</sup> Had the concept of appearance of impropriety been utilized, the associates of the attorney might have also been disqualified.

Soon after the district court decision in *T. C. Theatre* the Second Circuit, in *Consolidated Theatres, Inc. v. Warner Brothers Circuit Management Corp.*,<sup>21</sup> seemed to brush over the problems of a specialist who had left a large firm. It affirmed the disqualification of Robert E. Nickerson,<sup>22</sup> who had been an assistant to one of the senior partners at Dwight, Royall, Harris, Koegel and Caskey and had spent 80% of his time on motion picture antitrust suits.<sup>23</sup> In fact, he had participated in three such suits in which some defendants in the present case were involved though there was no direct evidence of his having obtained confidences useful to him in the present antitrust suit.<sup>24</sup> Nevertheless

---

17. *Id.*; accord, *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *Gas-A-Tron v. Union Oil Co.*, 1974-2 Trade Cas. ¶ 75,225 at 97,521 (D. Ariz.); *Doe v. A Corp.*, 330 F. Supp. 1352, 1356 (S.D.N.Y. 1971), *aff'd sub nom. Hall v. A. Corp.*, 453 F.2d 1375 (2d Cir. 1972) (*per curiam*); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969).

18. See 113 F. Supp. at 270 n.13; accord, *Emle Indus. Inc. v. Patentex, Inc.*, 478 F.2d 562, 572-73 (2d Cir. 1973); *Fleischer v. A.A.P., Inc.*, 163 F. Supp. 548, 551 (S.D.N.Y. 1958); H. Drinker, *Legal Ethics* 135 (1953).

19. 113 F. Supp. at 271-72.

20. One could begin with 1 Thessalonians 5:22 ("abstain from all appearance of evil") as cited in *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964) (disqualification of former IRS attorney from representing defendants whom he had previously investigated in his official capacity; violation of Canon 9). Approaching more modern times, see N.Y. County Lawyers' Ass'n, *Opinions on Professional Ethics*, No. 202 (1922). "To maintain public confidence in the Bar it is necessary not only to avoid actual wrong doing but an appearance of wrong doing." (attorney who had participated in earlier phases of litigation not allowed to change sides in later phase of same litigation; violation of current Canon 5). In reference to changing sides, cf. *Universal Athletics Sales Co. v. American Gym, Recreational & Athletic Equip. Corp.*, 357 F. Supp. 905, 910 (W.D. Pa. 1973) (former corporate officer cannot force disqualification of corporate counsel by taking side against corporation).

The *T. C. Theatre* court could have used the appearance of impropriety concept had it found it applicable to a situation in which an attorney opposed the interests of a former client. However, the courts which originated this concept did not utilize it in Canon 4 situations, but in situations now covered by Canons 5 and 9 of the Code of Professional Ethics and Canons 2 and 7 of the Code of Judicial Conduct.

21. 216 F.2d 920 (2d Cir. 1954).

22. *Id.* at 928.

23. *Id.* at 922-23.

24. *Id.* at 922, 924.

both he and his firm were disqualified.<sup>25</sup> Nickerson asserted that he had been a mere law clerk at the large firm, but the court found he had access to files and performed services which could have revealed confidential information to him.<sup>26</sup> The court realized that, since Nickerson's specialty was movie anti-trust suits, this decision would effectively end his career in that field.<sup>27</sup> However, it noted that "the overall field [was] still open to him."<sup>28</sup> The court suggested that an in camera session which would permit the court to evaluate the "content[s] of prior disclosures" to determine if they might be used against the former client, could be feasible in other cases which were not as complex as antitrust suits.<sup>29</sup> The overwhelming majority of later cases have not followed this suggestion.<sup>30</sup>

The movie antitrust field proved to be a fertile one for disqualification motions. In *Laskey Bros., Inc. v. Warner Bros. Pictures, Inc.*,<sup>31</sup> an attorney for the plaintiff whose previous partner had represented the defendant was disqualified.<sup>32</sup> Moreover, this partner's present partner was also disqualified.<sup>33</sup> The Second Circuit affirmed,<sup>34</sup> but stated that it would not order disqualification in a

---

25. Id. at 928.

26. Id. at 927.

27. Id. at 926.

28. Id.

29. Id. at 926 & n.7.

30. Two courts did utilize the in camera session to determine if confidential information had been obtained by the attorney in question: *United States v. Wilson*, 497 F.2d 602, 606 (8th Cir. 1974), cert. denied, 419 U.S. 1069 (1975); *Shelley v. The Maccabees*, 184 F. Supp. 797, 799 (E.D.N.Y. 1960), cert. denied, 365 U.S. 818 (1961). The courts determined that confidential information substantially related to the instant cases had not been disclosed. 497 F.2d at 606; 184 F. Supp. at 800, 801.

31. 130 F. Supp. 514 (S.D.N.Y.), aff'd, 224 F.2d 824 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956).

32. 224 F.2d at 825.

33. Id. As the district court stated, "Such disqualification would also apply to attorneys, not partners, having offices together. Where such situation exists, both partners, or the partner and the associate, should retire from the case." 130 F. Supp. at 519-20 n.5 (S.D.N.Y. 1955). But cf. *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971). Another case disqualifying the same firm because of one partner's prior partnership with someone privy to confidential information during the first partnership was *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F.2d 555, 557 (2d Cir. 1956), cert. denied, 355 U.S. 824 (1957). Chief Judge Clark, dissenting, thought the partner who had been associated with the previous partner should have been allowed to prove he had not received confidential information about defendant from that partner. Id. at 559. "I find the result here quite unfair to young lawyers attempting to break into substantial practice and undesirable in policy as helping to safeguard monopoly." Id. at 559-60. Accord, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581, 591 (E.D.N.Y. 1973), aff'd, 518 F.2d 751 (2d Cir. 1975): "Antitrust implications in unduly restricting the work of the largest law firms' former associates are not insubstantial since these firms have as clients corporations that control a major share of the American economy. . . . Large law firms may not protect their clients by monopolizing young talent. The Canons of Ethics furnish no warrant for illegal restraints on trade." The Second Circuit disagreed, finding no conflict between ethical standards and the antitrust laws. 518 F.2d at 757-58 n.9.

34. 224 F.2d 824, 828 (2d Cir. 1955).

new case having no connection to the former tainted partnership.<sup>35</sup> The court argued against the usage of an irrebuttable presumption of knowledge, taking into account the hardship this might inflict upon young attorneys. The court also recognized that such a presumption could have an even harsher effect on clients, whose interests might not be adequately protected "in view of the difficulty in discovering technically trained attorneys in specialized areas who were not disqualified, due to their peripheral or temporarily remote connections with attorneys for the other side."<sup>36</sup>

The concept of an "appearance of impropriety" standard, unmentioned by the courts in *T. C. Theatre, Consolidated Theatres*, and *Laskey Bros.*, was brought to the fore in *United States v. Standard Oil Co.*<sup>37</sup> But, whereas the Southern District of New York in *Standard Oil* applied the "appearance of evil" narrowly, because the motion dealt with a former government attorney,<sup>38</sup> later cases have ignored the relationship of the concept with public service attorneys *inter alia* and utilized it broadly.

Judge Kaufman, who wrote the decision in *Standard Oil*, found that the former government attorney who was representing one of the defendants should not be disqualified.<sup>39</sup> In formulating what he considered to be the standards to be met for the granting of a motion to disqualify, Judge Kaufman said: "[A] substantial relationship creates an inference that confidential information was reposed. Further, complainant need only show *access* to such *substantially related* material and the inference that defendant received these confidences will follow."<sup>40</sup> He reasoned "that there might be a situation where the client does not consult orally with the particular attorney" but where "nevertheless, records, files and other materials substantially related to the controversy at hand are made available to that attorney by the client."<sup>41</sup> As a result, the attorney would have access to various documents which presumably would not otherwise be made available to him.<sup>42</sup> The assumption of client confidences rests on there being "a substantial relationship between those former matters and the lawsuit in which the confidence question is raised."<sup>43</sup> Though the court found no applicable guide to what constituted a substantial relationship in the *T. C. Theatre* and *Consolidated Theatres* decisions, it held that there was no substantial relationship between what the former government attorney had done in his government work and the present suit.<sup>44</sup> The court then stated that there were two alternative routes to disqualification: first, the access-substantial-relationship-confidence inference in which the complaining former client wants to keep his disclosure secret, or,

---

35. *Id.* at 827.

36. *Id.*

37. 136 F. Supp. 345 (S.D.N.Y. 1955).

38. *Id.* at 359.

39. *Id.* at 357.

40. *Id.* at 354 (footnote omitted).

41. *Id.* at 354-55 n.11.

42. *Id.*

43. *Id.* at 355.

44. *Id.*



second, revelation by the complainant of specific documents substantially related to the subsequent case.<sup>45</sup>

Judge Kaufman discussed the appearance of evil by first stating that "the knowledge of one member of a law firm will be imputed by inference to all members of that firm,"<sup>46</sup> thus extending the chain of imputed knowledge down to the level of the firm's law clerks.<sup>47</sup>

Judge Kaufman dealt with the Canon 9 concept by stating that the facts of the case before him "refute[d] any actuality or appearance of evil."<sup>48</sup> The judge issued a warning:

When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-posts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.<sup>49</sup>

Judge Kaufman's discussion of the appearance of evil concept leading to disqualification (even if there were no factual basis for the action) seems to have been made solely in the context of the former government employment of one defense attorney.<sup>50</sup> Though his discussion followed a general statement, it came directly before his specific consideration of the government attorney's position.<sup>51</sup> Judge Kaufman doubted whether the Canons of Ethics were intended to disqualify attorneys who did not actually come into contact with materials related to the current controversy when acting as attorneys for former clients now adverse to their position.<sup>52</sup>

Later courts interpreted this discussion of appearance of evil or impropriety outside the context of government employment and utilized this concept in cases in which Canon 9 played no part. Thus, the criteria for disqualification became less defined and more expansive. The effect of a court's willingness to disqualify based merely on appearances is not only to deter attorneys who emerge from large law firms from starting their own partnerships, but also to delay a trial and increase the expense of litigation which the corporate client (represented by a large law firm) will find easier to bear than the small client represented by the attorney in question.<sup>53</sup>

---

45. *Id.* at 358.

46. *Id.* at 360; see 224 F.2d 824, 825-26 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956).

47. 136 F. Supp. at 360. *Contra*, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581, 589 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975): "Many distinguished lawyers have served brief apprenticeships with large firms where they have, in many instances, concentrated their work in highly specialized fields. The mode of assignment of work to young associates in modern large law firms make[s] unreasonable a rule of disqualification which would prevent them from ever litigating against clients of their former firm. Young lawyers will necessarily become overcommitted to their initial employer if the rules of disqualification are applied so as to prevent them from being retained by clients seeking their specialized services."

48. 136 F. Supp. at 365.

49. *Id.* at 367 (footnote omitted).

50. *Id.* at 364.

51. *Id.* at 364-65.

52. *Id.* at 364.

53. See *Marco v. Dulles*, 169 F. Supp. 622 (S.D.N.Y.), appeal dismissed, 268 F.2d 192 (2d

A factor that became important to the Second Circuit in justifying the use of the appearance of impropriety standard was the danger that an attorney might either unconsciously use confidential information or not be a strong adversary in order to avoid the appearance of impropriety. In *Emle Industries, Inc. v. Patentex, Inc.*,<sup>54</sup> a patent action, plaintiff's counsel, a specialist in patents in the knitting industry, was disqualified because he had previously represented defendant's part-owner as principal counsel concerning the identical issue.<sup>55</sup> The Second Circuit attempted to balance the free exercise of the right to choose counsel and the need to maintain high ethical standards.<sup>56</sup> Although this was a Canon 4 case and could have been decided solely on the basis of the "substantially-related" test, the Second Circuit referred to both Canons 4 and 9 stating that "even an appearance of impropriety requires prompt remedial action by the court. . . . [W]e conclude that [the attorney's] defense . . . precludes him from pressing similar claims in the instant suits."<sup>57</sup> Continuing, the court stated:

The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.<sup>58</sup>

Thus, though the court cited the substantial relationship test of *T. C. Theatre*, it spoke in terms of removing even the slightest (insubstantial?) doubt. In addition, the court rejected the suggestion that it determine factually whether the attorney in question had received confidences because that would violate Canon 4's stricture against revealing confidences.<sup>59</sup> The court, in other words, determined that if even a hint of impropriety<sup>60</sup> existed, the attorney must be disqualified, regardless of whether there actually was impropriety.<sup>61</sup> If the appearance of possible unethical conduct is sufficient to

---

Cir. 1959), in which there was a delay of nineteen years in moving to disqualify: "A motion to disqualify is of an equitable nature. A party making such a motion should do so with reasonable diligence and promptness after the facts have become known to it." *Id.* at 632. Even if this diligence were exercised, the moving party would still gain time in delaying the principal suit while its motion to disqualify was heard and appealed. Sometimes, this delaying tactic can backfire as in *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392 (D. Utah), rev'd and remanded, 518 F.2d 311 (10th Cir. 1975) (movant fined \$5,000 and motion denied).

54. 478 F.2d 562 (2d Cir. 1973).

55. *Id.* at 564.

56. *Id.* at 564-65.

57. *Id.* at 565.

58. *Id.* at 571.

59. *Id.*

60. Cf. the "shadow test" of *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156 (S.D.N.Y. 1973), in note 63 *infra*.

61. "Nowhere is Shakespeare's observation that 'there is nothing either good or bad but thinking makes it so,' more apt than in the realm of ethical considerations. It is for this reason that Canon 9 of the Code of Professional Responsibility cautions that 'A lawyer should avoid even the

disqualify, then the substantial relationship test, even when extended to those cases where the attorney might have access to confidential information, seems superfluous. Certainly the *Emle* court ignored the caveat in *Standard Oil* that the court "[w]hen dealing with ethical principles . . . cannot paint with broad strokes."<sup>62</sup> Since the Second Circuit had determined that there was a substantial relationship between the attorney's prior and subsequent appearances, it did not need its expansive dictum that avoidance of the appearance of impropriety necessitated the same result.<sup>63</sup>

That such an approach does not extend to actions taken in self-defense is apparent in *Meyerhofer v. Empire Fire & Marine Insurance Co.*,<sup>64</sup> in which the Second Circuit reversed the Southern District of New York's order dismissing plaintiff's action without prejudice and disqualifying their counsel, Bernson, Hoeniger, Freitag & Abbey (the Bernson firm). However, it affirmed the lower court's order prohibiting attorney Stuart Charles Goldberg from

---

appearance of professional impropriety' and it has been said that a 'lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a possible violation of confidence, even though this may not be true in fact.' " 478 F.2d at 571 (2d Cir. 1973), quoting ABA Comm. on Professional Ethics, Opinions, No. 885 (1965); contra, *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392, at 98,278 (D. Utah) rev'd and remanded, 518 F.2d 311 (10th Cir. 1975): "The rule of T. C. Theatre Corp. only sanctions disqualification of an attorney for prior representation of an adverse party when the disqualification is based upon an adequate evidentiary foundation. It does not permit disqualification based upon speculation or suspicion that confidential information may have been obtained . . . ."

Another case utilizing the concept of the appearance of impropriety was *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1961), aff'd, 302 F.2d 268 (2d Cir. 1962) (per curiam), in which the court disqualified plaintiff's counsel though he and the firm he joined while representing plaintiff "made every effort to comply with Canons 6 and 37 as they honestly interpreted them." Id. at 825. The Second Circuit, in affirming the disqualification, quoted the district court and stated: "[T]hough no actual improprieties had thus far occurred and . . . all adversary counsel had thus far acted with scrupulous regard of professional duties, responsibilities and ethics, 'Circumstances have now [been] created which, with Mr. Cunningham remaining in the case, will inevitably lead to suspicion and distrust in the minds of the defendant and the opportunity for misunderstanding on the part of the public which will lead to a lack of confidence in the bar.' " 302 F.2d at 269.

For a different approach, see *N.Y. Times*, Jan. 11, 1975, at 31, col. 1 in which the New York City Board of Ethics ruled that John V. Lindsay, former Mayor, could not enter litigation for two years in matters that had been before city agencies while he had been Mayor. However, Lindsay's firm was not prohibited from entering this type of litigation. The Board let stand without comment Lindsay's agreement with the firm not to share fees from this type of litigation.

62. 136 F. Supp. 345, 367 (S.D.N.Y. 1955).

63. In the spirit of *Emle*, the Southern District of New York used what could be termed a "shadow test" in disqualifying counsel in *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156 (S.D.N.Y. 1973). The court acted not only because counsel had represented defendants previously in matters substantially related to the Automobile Dealers' Day in Court Act suit he was bringing, but also because "his past activities raise a shadow over his present involvement." Id. at 158. The court stated the attorney had to be disqualified because of "an appearance of a conflict of interest. Even if his relationship with Saab Motors was relatively small and even if the prior action did not raise issues identical to those involved herein . . . ." Id.

64. 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974).

representing plaintiffs in this or similar actions and enjoining him from revealing material information except on discovery at trial.<sup>65</sup>

*Meyerhofer* involved a class action which asserted that Empire's registration statement and prospectus were materially false.<sup>66</sup> Goldberg had worked on the public offering for the law firm representing Empire, although another associate had primary responsibility. When the law firm would not make full disclosure of excessive fees, Goldberg resigned and appeared before the SEC. Later, he put this information in an affidavit.<sup>67</sup> When the instant suit was brought, plaintiffs represented by the Bernson firm initially named Goldberg as one of the defendants.<sup>68</sup> In order to prove his innocence in the stock arrangement, Goldberg conferred with plaintiffs' firm at least twice. As a result, plaintiffs dropped Goldberg as a defendant.<sup>69</sup>

The court recognized that Goldberg had acted in self-defense in accordance with Canon 4<sup>70</sup> and had not violated Canons 4 or 9,<sup>71</sup> under which the lower court had disqualified him. Moreover, Canon 9 could not eliminate DR 4-101(C)(4)'s privilege of revealing confidential information to defend oneself against accusations.<sup>72</sup> Although Goldberg had not been representing plaintiffs against Empire, the court prohibited his doing so then or in the future because of his knowledge. However, the relationship between him and the Bernson firm was not tainted; therefore, the latter did not have to be disqualified.

Other attorneys have been enjoined from suit, based on Canon 4 violations, where they have not been representing parties, but have been the actual parties themselves.<sup>73</sup> If their knowledge of confidential information would

65. *Id.* at 1196.

66. *Id.* at 1192.

67. *Id.* at 1193.

68. *Id.* at 1192.

69. *Id.* at 1193.

70. *Id.* at 1194-95. Specifically, DR 4-101(C) states, "A lawyer may reveal: . . . (4) Confidences or secrets necessary . . . to defend himself . . . against an accusation of wrongful conduct." ABA Code of Professional Responsibility DR No. 4-101(C) (1969) (footnotes omitted).

71. 497 F.2d at 1196.

72. *Id.* at 1195-96.

73. In *Doe v. A Corp.*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd sub nom. Hall v. A Corp.*, 453 F.2d 1375 (2d Cir. 1972) (*per curiam*), plaintiff Doe had acquired information about defendant while working for the law firm which represented it. When Doe learned he was to be fired, he bought one share of A Corporation common stock and brought a stockholders' derivative suit after ending his employment. 330 F. Supp. at 1354. The court disqualified Doe and his co-counsel and enjoined them from contacting A Corporation's shareholders or disclosing confidential information in the future. *Id.* at 1356. Accord, *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). The disqualified attorney there had also been associated with the firm which had represented defendant and he had unsuccessfully attempted to bring a class action and derivative suit against his former employer's client. *Id.* at 1383-84. Nor was the attorney allowed to be the class representative of shareholders suing the accountants who certified the corporation's financial statements. *Richardson v. Hamilton*, [1973-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,479, at 95,674 (E.D. Pa. 1974).

The court in *Doe* indicated that the attorney should have alerted the defendants that their conduct was wrongful and, if that were unsuccessful, then he should have severed relations rather than sue them. 330 F. Supp. at 1356.

have prohibited them from opposing former clients as attorneys for the other side, a fortiori, they cannot sue the former clients for themselves.<sup>74</sup>

Thus, if an attorney brings suit for himself or another against a former client, seeking to use confidential information obtained during the prior representation, Canon 4 provides a sufficient basis for disqualification. The *T. C. Theatre* court established the substantially related test which compares the factual substance of the two representations to determine if there is a conflict of interest and, therefore, a breach of the attorney-client relationship. But the Second Circuit, after *Standard Oil*, has not been satisfied until recently with the criteria under Canon 4. Not content to adopt *Standard Oil*'s access extension to the substantially-related test, the court has also adopted *Standard Oil*'s reliance on Canon 9's concept of appearance of impropriety. The result has been unfortunate and unfair: it has caused the disqualification of an attorney who only seemed to have behaved improperly,<sup>75</sup> has delayed trial while the disqualification motion was argued and decided,<sup>76</sup> and has deprived the small client of his specialized attorney.<sup>77</sup> When an attorney has truly violated Canon 4, the latter two consequences cannot be avoided—the first one can.

### III. THE CONTEXT OF THE APPEARANCE OF IMPROPRIETY STANDARD IN THE CODE OF PROFESSIONAL RESPONSIBILITY

To interpret the concept of appearance of impropriety in the context of the Code of Professional Responsibility, one should examine the specific language of the Disciplinary Rules and the notes to the broadly-worded Ethical Considerations. As noted,<sup>78</sup> only EC 9-3 and DR 9-101 specifically limit the concept of appearance of impropriety to judicial or other public employment. One may conclude therefore that a major use of appearance of impropriety is in the case of a former judge or prosecutor who accepts employment in a matter substantially similar to one in which he was previously engaged as a public servant. In that situation, the court may disqualify the attorney solely on the basis of his violation of Canon 9.<sup>79</sup>

---

74. Thus, in *Cord v. Smith*, 370 F.2d 418 (9th Cir. 1966), an attorney who had previously been disqualified could not oppose the same defendant as assignee to the claim his former client had been pressing. The attorney "would necessarily be doing, indirectly, the very thing that he is prohibited from doing—assisting [plaintiff] in pressing his suit. This is too easy a way to avoid the disqualification." Also the attorney could not assist plaintiff or his new counsel with advice. *Id.* at 424. Cf. *Chugach Elec. Ass'n v. United States District Court*, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967), in which the attorney for a trustee in bankruptcy was disqualified. *Id.* at 442. Though there was no showing of his having received confidential information from his former client (the defendant), the attorney had to be disqualified because of the "likelihood" that he had obtained knowledge. *Id.* at 443.

75. See note 61 *supra*.

76. *Silver Chrysler Plymouth Inc. v. Chrysler Motor Corp.*, 518 F.2d 751 (2d Cir. 1975).

77. *Consolidated Theatres, Inc. v. Warner Bros. Circuit Mgt. Corp.*, 216 F.2d 920 (2d Cir. 1954).

78. See notes 5 & 6 *supra*.

79. *Accord, United States v. Trafficante*, 328 F.2d 117, 119 (5th Cir. 1964) in which the

The specific language of Disciplinary Rule 9-101 and Ethical Consideration 9-3 leaves no doubt that the Code's concept of appearance of impropriety is applicable only to the former government attorney. It is in the broader language of the other Ethical Considerations in Canon 9 that the courts have found justification for disqualification in Canon 4 situations in which the attorney in issue had not been formerly employed by the government.

The notes with which the American Bar Association chose to indicate the meaning of appearance of impropriety contain, *inter alia*, four cases which deal with attorneys whose actions were *malum in se*.<sup>80</sup> Those actions had the

---

government moved to disqualify opposing counsel, a former IRS attorney, on the grounds of violations of former Canons 6, 37 (now covered by Canon 4) and 36 (now covered by Canon 9). The court found that the attorney had violated Canon 36. *Id.* at 120.

80. In *Erwin M. Jennings Co. v. DiGenova*, 107 Conn. 491, 141 A. 866 (1928), defense counsel's partner appeared as both advocate and witness for defendant, an action which the Bar disfavors. *Id.* at 496-97; 141 A. at 868. In *State ex rel. Nebraska State Bar Ass'n v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957), the State Bar's Advisory Committee filed a complaint against attorney Richards for fraud in handling estates; obtaining excessive fees as administrator and attorney without the heirs' approval; acting for both the administratrix and the county in fixing the inheritance tax in another estate matter; and failing to disclose facts fully to other heirs about a will which he had drawn up which had made him a beneficiary. *Id.* at 89-94, 104; 84 N.W.2d at 142-45, 150. The concept of appearance of impropriety in Canon 5 covers this particular situation: "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety." ABA Code of Professional Responsibility EC No. 5-6 (1969) (footnote omitted). *Cf.* In re Imperial "400" National, Inc., 481 F.2d 41, 54 (3d Cir.) (Lumbard, J., dissenting), cert. denied, 414 U.S. 880 (1973) in which Canons 9 and 5, particularly EC 5-15, referring to representation of multiple clients, were linked in the judge's assertion that the high standards which federal judges had to observe should apply to officers of the federal courts, including the counsel of a trustee in a bankruptcy reorganization. In *Richards*, the court suspended the attorney for one year. 165 Neb. at 104; 84 N.W.2d at 150.

In *People ex rel. Cutler v. Ford*, 54 Ill. 520 (1870), attorney Ford lied to attorney Cutler about title to land being in Cutler's client and the necessity for Cutler to advance \$900.00 to pay back taxes to an adverse possessor. *Id.* at 521-22. After Cutler paid half the amount, he discovered the truth, but Ford refused to return the money. *Id.* at 522. The court disbarred the misbehaving attorney. *Id.* at 523.

In the fourth case, *State Board of Law Examiners v. Sheldon*, 43 Wyo. 522, 7 P.2d 226 (1932), another attorney, whom the court subsequently disbarred (*id.* at 526; 7 P.2d at 227), extorted \$1,500 from his client by telling him that the police were charging the client with assault with intent to commit rape, and the client had best pay him \$1,100 for a bribe to secure his release. *Id.* at 523; 7 P.2d at 226. The police did release the client, but actually because they were only holding him as a witness. *Id.* at 522-26; 7 P.2d at 226-27. Having managed to procure the \$1,100 so easily, the attorney charged the client \$400.00 in legal fees. *Id.* at 524; 7 P.2d at 226-27.

The types of impropriety in these four cases sharply contrast with the Emle dictum that "there is nothing either good or bad but thinking makes it so." *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973). See text accompanying notes 54-63 *supra*. These were concrete examples of impropriety which naturally fostered the appearance of impropriety. If a court were to use Canon 9's appearance of impropriety concept in a Canon 4 case, the cases cited by the ABA show that the context in which the ABA uses the concept is clearly based on actual

appearance of impropriety because they were improper. In no case did the ABA cite a Canon 4 violation or a case in which an attorney had to be disciplined because his action seemed improper though it really was not.

The Canon 9 notes also refer to other examples from the former Canons of Professional Ethics and to ABA Opinions. Canon 29 from the former Canons refers to "Upholding the Honor of the Profession" by being willing to call public attention to corrupt or dishonest conduct of an attorney, *i.e.*, perjury. Similarly, an attorney should guard against the admission to the Bar of those unfit in morals or education.<sup>81</sup>

ABA Opinions Numbers 49, 226, and 150 are particularly relevant to an understanding of the intended uses of "the appearance of impropriety" standard. They all deal with situations to which Canon 4 is inapplicable. Opinion 49<sup>82</sup> deals with the situation of a lawyer who had been special master in a dispute over oil and was later associated with the firm that one of the litigants wanted to hire for the purpose of suing the bailee for the proceeds of the oil. The Committee stated that the firm could not represent the party since the special master himself could not become the litigant's representative, relying on former Canon 36's prohibition of a lawyer who has acted in a judicial capacity taking the side of a litigant in a case involving the same facts.

Opinion 226<sup>83</sup> deals with the propriety of one lawyer's contributing to another lawyer's campaign for judicial office. The Committee decided it was proper as long as the candidate's expenses exceeded his financial ability and he was worthy of support. The Committee added that the contribution should be made to a campaign committee rather than to the candidate himself so as to reduce "possible appearances of impropriety."

Opinion 150<sup>84</sup> deals with a prosecutor who had secretly recorded a conversation between an attorney and two defendants (one of whom was the attorney's client) in which the defendants made damaging admissions. The Committee stated that use of the recordings would be professionally improper.

Thus, in all the cases, canons, and opinions which the ABA cites to clarify its usage of the concept of appearance of impropriety, no Canon 4 situation arises. All the attorneys in question had either been formerly publicly-employed and bound to avoid unethical appearances because of the public trust invested in them or they had performed actions which were *malum in se*. No non-public attorney was chastised for seeming impropriety in the cases

---

impropriety. Any court facing a motion for disqualification on Canon 4 grounds should utilize definite criteria, *i.e.*, substantially-related matters, as did the Second Circuit in *Silver Chrysler*, rather than an amorphous interpretation of Canon 9, as did the Second Circuit in *Emle*.

81. "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client." ABA Canons of Professional Ethics No. 29 (1908).

82. ABA, Comm. on Professional Ethics, Opinions, No. 49 (1931).

83. ABA, Comm. on Professional Ethics, Opinions, No. 226 (1941).

84. ABA, Comm. on Professional Ethics, Opinions, No. 150 (1936); see Formal Opinion No. 337 (Aug. 10, 1974) (an attorney should not record any conversation without all parties' consent, with case-by-case governmental exceptions).

and opinions in the notes to Canon 9, which detailed factual bases for the determination of misconduct.

Though some of the ABA Opinions<sup>85</sup> issued in the last ten years might seem to be in accordance with the courts' broad interpretation of the appearance of impropriety, Opinion No. 1233 states that "no Disciplinary Rule prohibits absolutely the handling of an action on behalf of a new client against a former client."<sup>86</sup> This opinion deals with the propriety of a Legal Services office representing a certain Indian tribe and, after that representation would terminate, opposing the tribe for future clients. The opinion considered Canon 9's appearance of impropriety standard but added: "There is, of course,

---

85. ABA, Comm. on Ethics and Professional Responsibility, Opinions, No. 1125 (1974) (attorney who had previously represented wife in domestic matter and is now representing her husband in divorce proceedings with the wife's consent should discontinue representation when wife withdrew consent); *id.* No. 1016 (1968) (lawyer who hired another lawyer who had represented party who eventually became a third-party defendant could not file a cross-claim against that party without violating former Canon 6); *id.* No. 885 (1965) (citing *H. Drinker, Legal Ethics* (1953)), *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964), motion to vacate denied, 370 F.2d 418 (9th Cir. 1966), *In re Boone*, 83 F. 944 (C.C.N.D. Cal. 1897), and *N.Y. County Bar Opinion* 202 (1922), which the Committee uses as the basis for stating, as the *Emle* Court quoted: "Moreover, the lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not be true in fact." However, *Cord v. Smith* and *In Re Boone* dealt with actual impropriety: in each case, the attorney in question was going to utilize information obtained in the prior representation against his former client. 370 F.2d at 424; 83 F. at 946-47, 951. The standard that *Drinker* quotes from *In re Boone* which the Committee cites is a factual one: Will the attorney in question "be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection." *H. Drinker, supra*, at 105, quoting *In re Boone*, 83 F. 944, 952-53 (C.C.N.D. Cal. 1897). Moreover, the *N.Y. County Bar Opinion* 202 cited referred to an attorney who had switched sides in the same litigation, a situation covered by current Canon 5. Each of these authorities, rather than supporting the view that surface improprieties should be avoided, implies that real, factual improprieties should be avoided. *Cf.* ABA Comm. on Professional Ethics, Opinion No. 891 (1965) (a law firm's representation of a party against an employee of a corporation which has used the firm in minor matters might not necessarily violate former Canon 6 even though the firm might have to impute the employee's negligence to the corporation; but both lawyers and clients would have to consent expressly to the arrangement); *N.Y. County Lawyers' Ass'n, Comm. on Professional Ethics, Question No. 603* (1972) (lawyer may represent tenant in dispossession proceeding though he represented owner in an unrelated matter previously; however, if the attorney obtained confidential information which he could use against his former client, he should discontinue representing the tenant unless he has both parties' consent). Both of these sources utilized the factual approach to impropriety. If they had considered that mere appearances sufficed to create impropriety, their responses would have been markedly different. Another opinion using the factual approach derived from *In re Boone* is *N.Y. State, Professional Ethics Comm., Opinions, No. 25* (1966) (attorney who represented party sued over condition of his premises cannot represent a new party who was injured due to the same defect in the former client's premises). If only appearances were to govern, the ABA would not have stated that partnership in more than one firm is not unethical *per se*. ABA, Comm. on Professional Ethics, Opinions, No. 1253 (1972). The ABA, therefore, has not been consistent in banning the appearance of impropriety, relying instead on the facts of the case before it.

86. ABA, Comm. on Professional Ethics, Opinions, No. 1233 (1972).



no Disciplinary Rule making that course mandatory."<sup>87</sup> The Standing Committee decided it could not say yes or no to the office's proposed course of action because the decision should rest on the facts of each representation which had not yet occurred.

Just as Informal Opinion No. 1233 stated that decisions had to rest on the facts in each case, so should facts be the basis of decisions in disqualification cases under Canon 4. If courts cannot find on the facts that substantially-related matters are involved or cannot make the inference of confidential knowledge, courts should not rely on Canon 9 to justify a disqualification order. However, if courts do find on the facts that disqualification is warranted, their usage of the concept of appearance of impropriety actually varies from its specific Canon 9 context in the Code.

Just as courts look to legislative history to determine congressional intent to guide their decisions, so they should examine the notes to the canons to determine what the American Bar Association means in its usage of certain terms. Even though the first note of the Code of Professional Responsibility disclaims any representation of the views of the Special Committee on Evaluation of Ethical Standards,<sup>88</sup> one cannot but conclude that the sources to which the Code directs the reader in the notes are not mere cross-references,<sup>89</sup> but are indications of the context in which the principles are to be followed. None of Canon 9's notes, inclusive of cases, former canons, and opinions, refers to a Canon 4 situation in discussing the appearance of impropriety. Therefore, judicial usage of the concept in Canon 4 cases, especially as in the dictum of *Emle*,<sup>90</sup> has no foundation in the Code.

#### IV. *Silver Chrysler* AND ITS SIBLINGS

In its most recent disqualification case, the Second Circuit has turned away from *Emle* and based its affirmance of the denial of the motion strictly on the facts. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*<sup>91</sup> involved a young attorney, Dale Schreiber, who brought suit for his client under the Automobile Dealers' Day in Court Act.<sup>92</sup> Defendant was represented by Kelley, Drye, Warren, Clark, Carr & Ellis (hereinafter Kelley Drye), succes-

---

87. *Id.*

88. "The footnotes are intended merely to enable the reader to relate the provisions of this Code to the ABA Canons of Professional Ethics . . . , the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources; they are not intended to be an exhaustive annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards." ABA Code of Professional Responsibility 3 n.1 (1969).

89. "The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908. They were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of Professional Ethics. Since then a limited number of amendments have been adopted on a piecemeal basis." *Id.* at v.

90. 478 F.2d 562 (2d Cir. 1973).

91. 370 F. Supp. 581 (E.D.N.Y. 1973), motion to dismiss appeal denied, 496 F.2d 800 (2d Cir. 1974) (en banc), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

92. 370 F. Supp. at 584.

sor to the firm that had previously employed Schreiber as a junior associate before he formed the partnership of Hammond & Schreiber.<sup>93</sup> Defense counsel moved for disqualification under Canon 4,<sup>94</sup> alleging that Schreiber had gained confidential information from Kelley Drye's client, Chrysler Corporation, while Schreiber was an attorney working for Kelley Drye.<sup>95</sup>

The district court, in a lengthy opinion, denied the motion to disqualify for three reasons: (1) there could be no imputed knowledge of confidential information since all the evidence (affidavits) showed that Schreiber had not worked primarily on substantially-related cases for Chrysler Motors Corporation and he had never been more than a junior associate at Kelley Drye; (2) there was no proof of actual knowledge of confidential information since Kelley Drye refused to produce its time records to support further its allegations of his access to Chrysler matters; and (3) there was no appearance of impropriety.<sup>96</sup>

In its affirmance, the Second Circuit focused on the facts of the cases Schreiber had worked on in order to determine if they were substantially related to the issues in the present suit. The Second Circuit refused to take the "blanket approach" that in a large firm associates are privy to all the confidential information in the firm's files. Moreover, continuing its judicial notice of the reality of legal practice in large firms, the court recognized that many young lawyers spend the summer before their graduation at firms to which they do not return and, after graduation, "change their affiliation once or even several times."<sup>97</sup> The court found that the idea that "legal osmosis" occurs between the confidential disclosures made to various lawyers in the firm or kept in the files and these young lawyers was "self-refuting."<sup>98</sup> After all, at the time of suit, eighty attorneys were employed at Kelley Drye.<sup>99</sup>

Recognizing the importance of not unnecessarily curbing the careers of lawyers who began their practices in large firms,<sup>100</sup> the Second Circuit

---

93. *Id.* at 583.

94. *Id.*

95. *Id.* at 584-85.

96. *Id.* at 587-89.

97. 518 F.2d at 753.

98. *Id.*

99. 370 F. Supp. at 584. "The law must reject defendants' suggestion that for purposes of disqualification, in an organization as large as Kelley Drye, every associate is charged with the knowledge of the confidences of every lawyer in the firm. Nor can it accept the more limited submission that any associate who did substantial work for a client is thereafter precluded from opposing it in any litigation. Each case must rest on a close analysis of the facts in the light of the sometimes conflicting policies favoring protection of former client confidences and freedom of new clients to retain attorneys of their choice." *Id.* at 587. "[T]he court will assume that a senior partner knows more about what is happening in the firm generally than does a junior associate. . . . The persuasiveness and detail of the proof required will . . . vary inversely with the status of the lawyer in the firm in the prior litigation." *Id.*

100. That New York City is replete with large law firms is noted in "Questions Regarding Growth, Participation and Professional Responsibility in Law Firms," 29 Record of N.Y.C.B.A. 451 (1974), reprinted as "The Problems of Being Big," 60 A.B.A.J. 1278 (1974); "In New York

utilized the "patently-clear" substantial relationship test,<sup>101</sup> stating that this was the test used in *Standard Oil*.<sup>102</sup> But, there, Judge Kaufman advocated an access extension of the substantially-related test, *i.e.*, did the attorney have access to confidential information, rather than a narrowing of the test, *i.e.*, was it patently clear there was a substantial relationship.<sup>103</sup> The *Silver Chrysler* court's refinement of the substantially-related test is more concrete and restrictive than the access extension. Though the court recognized that an inference arises "that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one."<sup>104</sup> The court then quoted *Laskey* for the caveat that the standard for rebutting the inference should not be "unattainably high."<sup>105</sup> Judge Kaufman in *Standard Oil* might have imputed the inference of knowledge to all members of a firm,<sup>106</sup> but the Second Circuit impliedly disagreed in *Silver Chrysler*.

The court was aware also of the reality of the opponent's possible motive in moving to disqualify: to delay the suit and even to discourage the party from pressing his claim. Recognizing the delaying effect of a motion to disqualify, the Second Circuit remarked at the very beginning of its opinion that the factual background of the motion in *Silver Chrysler* was a "seemingly simple breach of contract complaint" which awaits trial.<sup>107</sup>

In contrast with the *Emle* court's emphasis on the appearance of impropriety,<sup>108</sup> the *Silver Chrysler* court closely analyzed the facts in the matters upon which Schreiber had worked while associated with Kelley Drye<sup>109</sup> to enable it to rely on a factual foundation for its opinion, rather than a philosophical one. The court distinguished six recent disqualification cases:<sup>110</sup> in three, the issues in the prior and subsequent matters were not just substantially-related but identical;<sup>111</sup> in the other three, the substantial re-

---

City alone there are approximately fifty firms with over fifty lawyers, of which half have over 100 attorneys."

The trend of the future was spelled out in Fuchs, "Lawyers and Law Firms Look Ahead—1971 to 2000," 57 A.B.A.J. 971, 975 (1971): "The lawyer of the future will be a member of a law firm, and the firm will be bigger and bigger." Fuchs noted that as "law firms grow bigger they will specialize more and more." *Id.* at 974. Those who work in these large firms will naturally learn a specialty from them.

101. 518 F.2d at 754.

102. 136 F. Supp. 345 (S.D.N.Y. 1955).

103. *Id.* at 354-55. See text accompanying note 53 *supra*.

104. 518 F.2d at 754, citing *Laskey Bros. v. Warner Bros. Pictures, Inc.*, 224 F.2d 824, 827 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956), and *United States v. Standard Oil Co.*, 136 F. Supp. 345, 364 (S.D.N.Y. 1955). See text accompanying notes 96-98, 100 *supra*.

105. 518 F.2d at 754, quoting *Laskey Bros. v. Warner Bros. Pictures, Inc.*, 224 F.2d at 827.

106. 136 F. Supp. 345, 360 (S.D.N.Y. 1955). See text accompanying notes 46-47 *supra*.

107. 518 F.2d at 754.

108. Cf. note 61 *supra*.

109. 518 F.2d at 756.

110. *Id.* at 754-55.

111. *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *General Motors Corp. v. City of*

lationship was patently clear.<sup>112</sup> In his concurrence, Judge Adams, unlike the majority, emphasized the appearance of impropriety, calling judges "the caryatids charged with upholding the highest of ethical standards . . . ."<sup>113</sup> However, he did not find that Schreiber had passed the "threshold quantum of similarity" so as to warrant disqualification.<sup>114</sup>

The Second Circuit chose to differentiate between seasoned lawyers "who become heavily involved in the facts of a particular matter" and more junior attorneys "who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions."<sup>115</sup> The court did not believe that this type of peripheral activity constituted "representation" because there was "no realistic chance that confidences were disclosed . . . ."<sup>116</sup> Use of the Canon 9 appearance of impropriety standard in its broad implications, however, could very well have resulted in Schreiber's disqualification. The Second Circuit dispatched this consideration by stating:

Neither Chrysler nor any other client of a law firm can reasonably expect to foreclose either all lawyers formerly at the firm or even those who have represented it on unrelated matters from subsequently representing an opposing party. Although Canon 9 dictates that doubts should be resolved in favor of disqualification, . . . it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder.<sup>117</sup>

The Second Circuit's application of a realistic, factual approach represents a swing of the pendulum away from reliance on the appearance of impropriety standard in Canon 4 cases. This is noteworthy because in two recent decisions prior to *Silver Chrysler*, the Second Circuit had occasion to apply the appearance of impropriety standard—in the first, narrowly; in the second, seemingly more

---

New York, 501 F.2d 639 (2d Cir. 1974); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973).

112. *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973); *Chugach Elec. Ass'n v. United States Dist. Ct.*, 370 F.2d 441 (9th Cir. 1966); *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156 (S.D.N.Y. 1973).

113. 518 F.2d at 759 (Adams, J., concurring).

114. *Id.* at 759-80 (Adams, J., concurring).

115. *Id.* at 756-57.

116. *Id.* at 757. *Marco v. Dulles*, 169 F. Supp. 622 (S.D.N.Y. 1959), a stockholders' derivative suit, defined "confidence" and "confidences." The court denied the defendant corporation's motion to disqualify the individual defendant's law firm stating: "[Confidence or confidences] include more than specific matters of fact or information which come to the lawyer on a confidential basis. They include also intangibles arising from the very nature of the lawyer-client relationship which result from mutual discussion of the problems facing the client, consideration of the problems by counsel and the advice given thereon, the rationale of the solutions proposed and the legal techniques by which such solutions are arrived at." *Id.* at 629. Canon 4's Disciplinary Rules define "confidence" to refer "to information protected by the attorney-client privilege under applicable law. . . ." and also define "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." ABA Code of Professional Responsibility DR 4-101(A) (1969).

117. 518 F.2d at 757 (citation omitted).

broadly. In the first case, *General Motors Corp. v. City of New York*,<sup>118</sup> the court distinguished Canon 4 from Canon 9 in disqualifying a former government attorney. The attorney had been employed by the Justice Department when it brought an antitrust suit against General Motors Corporation during the 1950s.<sup>119</sup> In the subsequent action, he served as private counsel to the City of New York, which was in the process of bringing an antitrust action on the same or similar grounds as the 1954 federal suit,<sup>120</sup> a violation of Canon 9. Although the Second Circuit held that Canon 4 did not apply in this Canon 9 case,<sup>121</sup> it did not say the opposite—that Canon 9 does not apply in a Canon 4 case.

In utilizing the appearance of impropriety concept as a "beacon" for the "good man" as he sailed "through the sometimes murky waters of professional conduct,"<sup>122</sup> the court stated:

[W]e must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession. . . . [T]here lurks great potential for lucrative returns in following into private practice the course already charted with the aid of governmental resources.<sup>123</sup>

On its facts, *General Motors* is clearly distinguishable from *Silver Chrysler*. Therefore, its analysis in terms of Canon 9 exclusively is appropriate as applied.

In the second case, *Hull v. Celanese Corp.*,<sup>124</sup> an attorney who was formerly employed by defendant was not permitted to intervene in a sex discrimination suit.<sup>125</sup> She had actually worked for Celanese during the early stages of the *Hull* suit before deciding to change sides<sup>126</sup> and had conferred with plaintiff Hull and Hull's counsel while still employed,<sup>127</sup> thus causing the court to disqualify the law firm from representing her and Hull.<sup>128</sup> The Second Circuit affirmed in "the

---

118. 501 F.2d 639 (2d Cir. 1974), noted in 16 B.C. Ind. & Com. L. Rev. 651 (1975). The author cautions against an overly broad usage of Canon 9 in order to protect the public interest in having well-trained attorneys serve in the courts; he feels that if a former government attorney is now engaged in similar litigation in private practice, as long as he is receiving remuneration on a par with or below what he had received in government service, he should not be disqualified. *Id.* at 657. Otherwise, the author warns, there will be a deterrent effect—lawyers would not join government service because they would worry about the appearance of evil rather than the "fact of propriety." *Id.* at 660.

119. 501 F.2d at 642.

120. *Id.* at 650-51.

121. *Id.* at 650 n.20.

122. *Id.* at 649.

123. *Id.* at 649-50.

124. 513 F.2d 568 (2d Cir. 1975).

125. 375 F. Supp. 922 (S.D.N.Y. 1974).

126. *Id.* at 923.

127. The court also found that the attorney's claim that a constitutional right of association justified her intervention was without merit: "First Amendment rights may not be used as a means or the pretext for achieving 'substantive evils'. . . ." *Id.* at 925, quoting *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

128. 8 E.P.D. ¶ 9537, at 5343 (S.D.N.Y. July 12, 1974), *aff'd*, 513 F.2d 568 (2d Cir. 1975).

spirit of Canon 9 as interpreted by this Court in *Emle*" though it recognized "the efforts of [plaintiff's] firm to avoid the receipt of any confidence."<sup>129</sup>

Relying on *Emle* and *T. C. Theatre*, the court said that since the possibility existed that the law firm had received confidential information, it had a duty to disqualify the attorney.<sup>130</sup> But, *T. C. Theatre* did not deal with a situation in which the court recognized as it did here that there had been no disclosure. Moreover, the *T. C. Theatre* court did not find that the disqualified attorney had "tainted" his associates so as to necessitate their disqualification.<sup>131</sup> No case has criticized the *T. C. Theatre* decision for not disqualifying those associates.

While the *Hull* court relied on Canon 9 to disqualify the law firm (although the "taint" arose from a prospective violation of Canon 4 by the attorney), the court cautioned against any "broad-brush approach to disqualification" and stated its opinion should be narrowly-read and "confined to the facts presented."<sup>132</sup> The *Hull* case seems an extension of those cases in which an attorney privy to confidences sues the disclosing party himself. Here, the attorney as client tainted the firm representing her and the plaintiff. *Silver Chrysler* is far more important as a guide to the criteria the courts will use in determining Canon 4 disqualification motions because of the more likely occurrence of its situation, *i.e.*, young attorneys emerging from large law firms to set up their own specialized practices.

In these three recent cases, the Second Circuit has had full opportunity to employ the appearance of impropriety concept but, in each case, has utilized it hesitantly. In *General Motors*, Canon 9's appearance of impropriety was fully applicable because the case was a perfect example of the Code's standard of violative behavior. In *Hull*, the court was faced with an extended Canon 4 situation, and applied the concept narrowly by confining its dictum to the facts. It is arguable that the firm should not have been disqualified since it was apparent that it had not received any confidences. But the precedential damage is limited by the unusual facts of the case. In *Silver Chrysler*, the court de-emphasized the concept of appearance of impropriety because it had a bona fide Canon 4 issue to resolve, with the matters of two representations to compare. Appearances yielded to facts in the court's realistic analysis of the relationship of the two representations. Thus, there are now definite guidelines for attorneys to follow in agreeing to represent clients:<sup>133</sup> if an attorney has engaged in a representation whose substantial relationship to a possible second representation is patently clear and would necessitate his opposing his former client, he should not accept the second representation.

## V. CONCLUSION

The *Silver Chrysler* court has broken the trend set by cases utilizing the appearance of impropriety standard in Canon 4 disqualification decisions,

---

129. 513 F.2d at 571-72.

130. *Id.* at 572.

131. *Id.*

132. *Id.*

133. See text preceding note 138 *infra*.

climaxed by the nebulous dictum of *Emle*. Not only did the court utilize a strictly factual approach in deciding to affirm the denial of the motion, but for the first time in recent years it also applied judicial notice recognizing the reality of the practice of law in large firms as experienced by young associates. Whereas the *Emle* opinion would deter a young attorney from ever looking at one of his former employer's clients, the *Silver Chrysler* opinion provides just and fair guidelines for determining if there is a conflict of interest. Not only does the young attorney benefit from precise and realistic guidelines in the disqualification area, but the small client benefits as well, for he is most likely to be represented by the young attorney.

The aim of the appearance of impropriety standard is to serve the public. Ironically, utilization of facts in a Canon 4 case, rather than of the appearance of impropriety concept, is more likely to serve the public by providing the better representation obtainable from young attorneys trained in the large law firms and now engaged in specialized practice for themselves. By deemphasizing the appearance of impropriety concept in Canon 4 cases, the *Silver Chrysler* court has fulfilled that concept's aim far better than the *Emle* court did with its hazy philosophy.

In no part of Canon 9, its Disciplinary Rules or the notes to its Ethical Considerations is there a basis for the "strict prophylactic rule" that the *Emle* court<sup>134</sup> proposed in Canon 4 cases. As Judge Weinstein said in the district court opinion of *Silver Chrysler*:

[T]he courts must be cautious not to interfere needlessly with the freedom of litigants to proceed with counsel of their choice, and . . . not to unnecessarily circumscribe the career of a young professional. The Canons may not be used to engross legal talent

. . . .<sup>135</sup>

The ultimate question is whether courts will base decisions to disqualify attorneys accused of violating Canon 4 on an interpretation of law as "a brooding omnipresence in the sky"<sup>136</sup> with cloudy conceptions of the appearance of impropriety expanded beyond its specific context in the Code, or will they base the decisions solely on down-to-earth facts, as did the Second Circuit in *Silver Chrysler*.<sup>137</sup>

If the decision to disqualify under Canon 4 is based solely on the facts of the case—that the attorney merits disqualification because of a true conflict of interest—then, appearances should have no bearing. An attorney will have violated Canon 4 if he has (1) represented a client, (2) later opposed that client, (3) been involved in matters in the subsequent representation that are substantially-related to the matters in the former representation, and (4) either received actual confidential information from or concerning the former client,

---

134. 478 F.2d 562, 574 (2d Cir. 1973).

135. 370 F. Supp. 581, 583 (E.D.N.Y. 1973).

136. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (speaking of the common law).

137. Cf. *Fullmer v. Harper*, Civil No. 75-1162 (10th Cir., filed May 5, 1975) (reversed district court's denial of motion to disqualify because there was no factual basis, i.e., no written response and no testimony, upon which to make a decision).

or (5) been so situated that it was highly probable he had access to confidential materials during the former representation so that an inference of privileged knowledge arises. Certainly, these criteria establish a sufficient basis for disqualification to protect the attorney-client privilege, which is the object of Canon 4.<sup>138</sup> To add the appearance of impropriety to the above-mentioned criteria seems superfluous at best and highly damaging at worst because it can permit disqualification when an attorney only seems to have done something improper, although he has actually behaved ethically.<sup>139</sup>

*Laura D. Millman*

---

138. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1195-96 (2d Cir.), cert. denied, 419 U.S. 998 (1974); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 395-96 (S.D. Tex. 1959); and *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821, 825 (D. Conn. 1961), aff'd, 302 F.2d 268 (2d Cir. 1962) (per curiam). Contra, *United States v. Wilson*, 497 F.2d 602, 605-06 (8th Cir. 1974), cert. denied, 419 U.S. 1069 (1975) (Assistant U.S. Attorney allowed to prosecute defendant he had defended in previous cases concerning similar subject matter); *Uniweld Products, Inc. v. Union Carbide Corp.*, 385 F.2d 992 (5th Cir. 1967), cert. denied, 390 U.S. 921 (1968) (affirmed denial of motion to disqualify plaintiff's retained firm from bringing suit against defendants whom the firm had defended twice in same field).

139. See generally *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1961), aff'd, 302 F.2d 268 (2d Cir. 1962) (per curiam). But see *N.Y. County Lawyers' Ass'n, Comm. on Professional Ethics*, Question No. 623 (1974) (since no confidential information disclosed, attorney may represent client against former client; no consideration of appearance of impropriety) and Question No. 610 (1973) ("In the absence of any confidential information obtained by the inquiring attorney in the course of his former representation . . . there is no impropriety in the proposed representation. . . ."); *ABA, Comm. on Professional Ethics, Opinions*, No. 165 (1936) (not a violation of former Canon 6 to name a former co-plaintiff whom the attorney represented, inter alia, as a nominal co-defendant in the same action).